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Nos. 89-1084 and 89-6313

In the Supreme Court of the United States

OCTOBER TERM, 1989

PEDRO DASILVA AND STEVEN FINN, PETITIONERS

v.

UNITED STATES OF AMERICA

JEANMARIE CHAPOTEAU AND MICHAEL CROWN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether petitioners' convictions must be reversed because a magistrate presided over jury selection at their trial even though they did not object to the magistrate's role.

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OPINION BELOW

The opinion of the court of appeals (89-6313 Pet. App. A1-A28) is reported at 887 F.2d 376.

JURISDICTION

The judgment of the court of appeals was entered on September 26, 1989. A petition for rehearing filed by peti-

tioners Chapoteau and Crown was denied on December 6, 1989 (89-6313 Pet. App. A29), and their petition for a writ of certiorari (No. 89-6313) was filed on December 21, 1989. The petition in No. 89-1084 was filed on December 26, 1989, within the extension of time granted by Justice Marshall on November 27, 1989. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, petitioners DaSilva and Chapoteau were convicted of conspiracy to import and distribute cocaine, in violation of 21 U.S.C. 846, importation of cocaine, in violation of 21 U.S.C. 952 and 960, and possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Petitioners Finn and Crown were convicted of conspiracy to import and distribute cocaine, in violation of 21 U.S.C. 846.

Petitioner DaSilva was sentenced to a term of 15 years' imprisonment and fined $25,000. Petitioner Finn was sentenced to a suspended term of eight years' imprisonment and placed on probation for five years. Petitioner Chapoteau was sentenced to a term of 18 years' imprisonment and fined $200,000. Petitioner Crown was sentenced to four years' imprisonment.

1. The evidence at trial showed that petitioners participated in a conspiracy to import, possess, and distribute large quantities of cocaine from Brazil. The co-conspirators used the facilities and employees of Pan American World Airways and Varig Airlines over an eight-year period to facilitate their scheme. The co-conspirators used two methods of importation. Under one method, Brazilian suppliers would conceal the cocaine in suitcases and send them to John F. Kennedy International Airport (JFK) as un-

accompanied luggage. The Brazilian suppliers then would inform their contacts at JFK of the arriving shipment. Upon the arrival of the drugs at JFK, an employee of Pan Am or Varig would intercept and deliver the cocaine to the intended party. Under the second method, a courier would carry the cocaine from Brazil and employees of Pan Am or Varig would assist him in avoiding detection by the United States Customs Service. 89-6313 Pet. App. A6.

Petitioner Chapoteau was an early supervisor of the smuggling operations at Pan Am. Petitioner DaSilva was the supervisor of the drug-smuggling activities at Varig. Petitioner Crown, a former employee of Pan Am, received and distributed large amounts of cocaine. And petitioner Finn purchased cocaine from various importers. 89-6313 Pet. App. A6-A7.

2. On January 14, 1988, the district court held a pretrial conference with petitioners' attorneys. During the conference, the district court asked petitioners' counsel whether they "object[ed] to the Magistrate selecting the jury." 89-6313 Pet. App. A32. Counsel for petitioner Finn replied that he did not understand the court's question. The court then stated, "All it means is that the Magistrate will select the jury with counsel instead of my doing it. The Magistrate would do it." *Id.* at A33. None of the lawyers for petitioners expressed any objection. A magistrate later presided over jury selection without objection from petitioners.

3. Petitioners did not raise the matter of the magistrate's presiding over jury selection in their initial brief in the court of appeals. Instead, petitioners challenged the district court's failure to grant a severance, the sufficiency of the evidence supporting their convictions, and the admission of certain trial testimony. After oral argument, petitioners filed supplemental briefs claiming that this Court's decision in *Gomez* v. *United States*, 109 S. Ct. 2237 (1989), required reversal of their convictions. In *Gomez*, the Court had reversed con-

victions where a magistrate conducted jury selection over the objection of the defendants.

The court of appeals rejected petitioners' *Gomez* claim and affirmed their convictions. 89-6313 Pet. App. A1-A28. The court held (*id.* at A14-A15) that petitioners' failure to object to the magistrate's role at jury selection meant that their convictions need not be reversed. The court relied on its earlier decision in *United States* v. *Mang Sun Wong*, 884 F.2d 1537 (2d Cir. 1989), cert. denied, No. 89-5949 (Feb. 20, 1990), in which it held that a defendant who consented to the delegation of jury selection to a magistrate could not obtain reversal under *Gomez*. The court found that its analysis in *Mang Sun Wong* applied as well to a defendant who failed to object to the delegation of jury selection to a magistrate.

ARGUMENT

Petitioners renew their contention (89-1084 Pet. 10-18; 89-6313 Pet. 8-22) that their convictions must be reversed because a magistrate presided over voir dire even though they did not object to the magistrate's role. The government has petitioned for a writ of certiorari in *United States* v. *France*, No. 89-1363) (filed Feb. 26, 1990), which raises the question whether a defendant who did not object to the magistrate's presiding over voir dire may have her conviction reversed on appeal. In our petition in that case, we argue that an objection is required to preserve the *Gomez* issue on appeal, and that a magistrate's presiding over voir dire before *Gomez* was not "plain error" that may be noticed on appeal without an objection.[1]

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[1] Petitioners contend (89-1084 Pet. 10-12; 89-6313 Pet. App. 9-14) that the supervision of jury selection by a magistrate is a "jurisdictional defect" in the sense that error may never be forfeited by the failure to object. That contention misapprehends this Court's use of the term

These petitions raise the same basic issue as the government's petition in *France*—whether a defendant's conviction must be reversed under *Gomez* even though he did not object to the magistrate's role at voir dire. But we believe that *France* is the better case for the Court to hear on the merits because it also presents the significant subsidiary issue whether the failure to object may be excused on the ground of futility. As we explain in our *France* petition, that subsidiary issue has widespread importance in the Ninth Circuit because of the large number of cases on direct appeal in that circuit when *Gomez* was decided. Thus, because the "futility" question is not raised in this case arising from the Second Circuit, we submit that the Court should grant review in *France* and hold these petitions.[2]

"jurisdiction" in *Gomez*. See *United States* v. *Wey*, No. 89-2106 (7th Cir. Feb. 15, 1990) (jury selection by magistrate was not plain error even though Court in *Gomez* used word "jurisdiction"). In *Gomez*, this Court held that the error under the Magistrate's Act was not harmless because a defendant has a basic right "to have all critical stages of a criminal trial conducted by a person with jurisdiction to preside." 109 S. Ct. at 2248. The Court's use of the term "jurisdiction" refers to the trial court's statutory authority—*i.e.*, that the district court had no authority under the Magistrates Act to refer jury selection to a magistrate. See *United States* v. *Rodgers*, 466 U.S. 475, 479-480 (1984) (defining jurisdiction in 18 U.S.C. 1001 to mean "official, authorized functions"); cf. *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385, 395 (1982) (holding that time limit for filing Title VII claims could be waived or tolled even though Court had earlier termed the requirement "jurisdictional"). It does not follow, therefore, that the district court lacked subject matter jurisdiction in this case to enter a judgment of conviction against petitioner.

[2] It is logically possible for this Court in *France* to affirm on the ground of futility and thus not reach the important question of plain error. But for the reasons we give in our petition in *France*, we believe that the defendant's failure to object clearly cannot be excused on the ground of futility. Accordingly, we believe that it is very likely that the Court in *France* will address the question of plain error. For that

CONCLUSION

The petition for a writ of certiorari in *United States* v. *France*, No. 89-1363, should be granted and these petitions should be held and disposed of in light of the Court's decision in *France*.

Respectfully submitted.

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Solicitor General

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reason, we do not believe that it is necessary for the Court to grant certiorari both in *France* and in these cases in order to ensure that the plain error issue is presented for review.

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